

SERVICE DATE – AUGUST 19, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 6 (Sub-No. 493X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN COOK COUNTY, ILL.

Digest:¹ This decision allows BNSF Railway Company to end its common carrier obligation to provide freight rail service over an approximately 0.89-mile of rail line in Cook County, Ill., subject to environmental and standard employee protective conditions.

Decided: August 17, 2016

By petition filed on May 3, 2016, BNSF Railway Company (BNSF) seeks an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10903 to abandon an approximately 0.89-mile rail line on BNSF's Lumber District Lead beginning just west of Laflin Street at Engineering Station 118+00 and proceeding east along West Cermak Road to the most easterly point at Engineering Station 157+65 and heading north along the Sangamon Street Lead at Engineering Station 163+50, including both legs of the wye, in Chicago, Cook County, Ill. (the Line). Notice of the exemption was served and published in the Federal Register on May 23, 2016 (81 Fed. Reg. 32,381).

No comments in opposition to the proposed abandonment were filed. We are granting the exemption from 49 U.S.C. § 10903, subject to environmental and standard employee protective conditions.

BACKGROUND

According to BNSF, no traffic has moved on the Line since August 2014. BNSF states that rail service for Colonial Brick Company, Inc. (Colonial Brick), the only customer on the Line, stopped in August 2014 after the Line was embargoed following a train derailment due to poor track conditions. According to BNSF, Colonial Brick has continued its operations without moving traffic on the Line and does not oppose the proposed abandonment. BNSF also states that there is no overhead traffic on this portion of the Line proposed for abandonment.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail carrier may not abandon a rail line without the prior approval of the Board. Under 49 U.S.C. § 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed abandonment is not necessary to carry out the RTP in this case. There is no freight rail traffic currently on the Line, and Colonial Brick has not utilized service on the Line for over two years. An exemption would therefore meet the RTP requirements to minimize the need for Federal regulatory control over the rail transportation system and reduce regulatory barriers to exit. 49 U.S.C. §§ 10101(2) & (7). An exemption would also foster sound economic conditions and encourage efficient management by more quickly permitting BNSF to abandon the Line to avoid the significant opportunity costs associated with retaining the Line. 49 U.S.C. §§ 10101(5) & (9). Other aspects of the RTP would not be adversely affected by the use of the exemption process.

We also find that regulation under 49 U.S.C. § 10903 is not necessary to protect shippers from the abuse of market power.² Colonial Brick, the Line's only shipper, has continued its operations without moving traffic on the Line for over two years and, according to BNSF, does not oppose the proposed abandonment. Further, there is no overhead traffic that could be adversely affected. Nevertheless, to ensure that Colonial Brick is informed of our action here, we will direct BNSF to serve a copy of this decision on Colonial Brick within five days of the service date of this decision and to certify to the Board contemporaneously that it has done so.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose upon BNSF the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979).

Environmental Review. BNSF submitted a combined environmental and historic report and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 C.F.R. §§ 1105.7 & 1105.11. The Board's Office of Environmental Analysis (OEA) has

² Because we find that regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power, we need not determine whether the proposed abandonment is limited in scope.

examined the report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA issued an Environmental Assessment (EA) on July 1, 2016, recommending that two environmental conditions be imposed on any decision granting abandonment authority. The first condition would require BNSF to: (a) contact the U.S. Fish and Wildlife Service (USFWS) to discuss potential impacts to any federally listed, endangered, threatened, or candidate species that may occur in the vicinity of the right-of-way, (b) should any protected species be identified that may be affected by salvage activities, identify the species and the potential impacts, (c) consult with OEA and USFWS to develop appropriate mitigation measures to avoid or reduce impacts to the protected species, and (d) be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the consultation process with USFWS and OEA is complete and the Board has removed this condition. The second condition would require BNSF to use best management practices during salvage operations in order to address the U.S. Army Corps of Engineers' (Corps) concerns regarding the use of sediment and erosion control measures during salvage operations. These measures may include, but would not be limited to, the installation and maintenance of erosion and sediment control devices in any areas involving the removal of vegetation.

OEA received one new comment in response to the EA by the August 1, 2016 due date. OEA issued its final EA on August 2, 2016.

In the final EA, OEA states that on July 18, 2016, the Miami Tribe of Oklahoma commented that it has no record of cultural or historic resources within the area of the proposed abandonment, but requested that it be immediately notified if any unanticipated archaeological sites, human remains, or Native American cultural items are discovered during the salvage process, as the area is part of its ancestral homeland. In response to the request, OEA recommends that the following new condition be imposed: in the event that any unanticipated archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, BNSF shall immediately cease all work and notify OEA and the Illinois Historic Preservation Agency (State Historic Preservation Office or SHPO), pursuant to 36 C.F.R. § 800.13(b). OEA shall then consult with the Miami Tribe of Oklahoma, the SHPO, BNSF, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

Consistent with OEA's recommendations, the two conditions recommended in the EA and final EA and the new condition recommended in the final EA will be imposed.

Based on OEA's recommendation, the Board concludes that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by BNSF of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line, and subject to the following three conditions: (1) BNSF shall (a) contact USFWS to discuss potential impacts to any federally listed, endangered, threatened, or candidate species that may occur in the vicinity of the right-of-way, (b) should any protected species be identified that may be affected by salvage activities, identify the species and the potential impacts, (c) consult with OEA and USFWS to develop appropriate mitigation measures to avoid or reduce impacts to the protected species, and (d) not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the consultation process with USFWS and OEA is complete and the Board has removed this condition; (2) to address the Corps' concerns regarding the use of sediment and erosion control measures during salvage operations, BNSF shall use best management practices during salvage operations, which may include, but not be limited to, the installation and maintenance of erosion and sediment control devices in any areas involving the removal of vegetation; and (3)(a) in the event that any unanticipated archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, BNSF shall immediately cease all work and notify OEA and the SHPO, pursuant to 36 C.F.R. § 800.13(b), and (b) OEA will then consult with the the Miami Tribe of Oklahoma, the SHPO, BNSF, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

2. BNSF is directed to serve a copy of this decision on Colonial Brick within five days after the service date of this decision and to certify contemporaneously to the Board that it has done so.

3. An Offer of Financial Assistance (OFA) under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by August 29, 2016, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,600. See 49 C.F.R. § 1002.2(f)(25).³

4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in boldface on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

³ Consistent with our precedent, and given the apparent lack of need for the Line by any shipper, any person seeking to file an OFA must provide evidence that there is some shipper that would make use of common carrier service. See, e.g., CSX Transp., Inc.—Aban. Exemption—in Wash. Cty., Md., AB 55 (Sub-No. 727X) (STB served Oct. 24, 2013); Union Pac. R.R.—Aban. Exemption—in Pottawattamie Cty., Iowa, AB 33 (Sub-No. 300X) (STB served Jan. 20, 2012).

5. Provided no OFA has been filed, this exemption will be effective on September 18, 2016.

6. Petitions to stay must be filed by September 6, 2016. Petitions to reopen must be filed by September 13, 2016.

7. Pursuant to 49 C.F.R. § 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by BNSF's filing of a notice of consummation by August 19, 2017, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after the satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.